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IN THE
**Supreme Court of the United States**
**October Term, 1990**

In Re Grand Jury Subpoena Served Upon
LINDA BACKIEL,

*Petitioner,*

-versus-

UNITED STATES OF AMERICA,

*Respondent.*

# BRIEF AMICI CURIAE OF THE ASSOCIATION OF LEGAL AID ATTORNEYS, THE CARIBBEAN PROJECT FOR JUSTICE AND PEACE, COMITE DE CIUDADANOS PRO DERECHOS HUMANOS (CITIZENS' COMMITTEE FOR HUMAN RIGHTS), COMITE UNITARIO CONTRA LA REPRESION (UNITARY COMMITTEE AGAINST REPRESSION), CONCILIO GENERAL DE TRABAJADORES (GENERAL COUNCIL OF WORKERS), UNION INDEPENDIENTE DE ABOGADOS DE ASISTENCIA LEGAL (INDEPENDENT UNION OF LEGAL SERVICES ATTORNEYS) (UIAAL), INSTITUTO PUERTORRIQUEÑO DE DERECHOS CIVILES (PUERTO RICAN INSTITUTE FOR CIVIL RIGHTS), INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and UNION INDEPENDIENTE DE TRABAJADORES DE AEROPUERTO (INDEPENDENT UNION OF AIRPORT WORKERS) IN SUPPORT OF LINDA BACKIEL'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARTHUR KINOY
DOROTHY E. ROBERTS
*Rutgers School of Law—Newark*
15 Washington Street
Newark, New Jersey 07102
(201) 648-5561
MARTHA COPLEMAN
60 Pineapple Street
Brooklyn, NY 11201
(718) 858-4620

Dick Bailey Appellate Printers ► Tel.: 1-800-564-4918 ◄
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**Consent of Parties**

Petitioner and respondent have consented to the filing of this brief.

**Interest of Amici**

THE ASSOCIATION OF LEGAL AID ATTORNEYS (ALAA) was founded in 1969 and has 900 members employed as staff attorneys at the Legal Aid Society of New York City.

THE CARIBBEAN PROJECT FOR JUSTICE AND PEACE is an organization that works for the construction of peace and the establishment of a more just social order in the Caribbean. Linda Backiel's background as an advocate of human and civil rights in the United States is well-known. She has worked arduously to demonstrate the repressive characteristics of the grand jury system. Ms. Backiel has made an enormous contribution to the investigations of the grand jury system conducted by the United States Senate and House of Representatives.

COMITE DE CIUDADANOS PRO DERECHOS HUMANOS (CITIZEN'S COMMITTEE FOR HUMAN RIGHTS) is concerned about the effect that enforcement of the subpoena against Attorney Linda Backiel would have because it has witnessed her devotion to human rights of those involved in the struggle for self-determination for Puerto Rico. Enforcement of a subpoena requiring her testimony against a client would surely discourage others from such advocacy and would penalize valuable work. The CCDH is also concerned because as an organization with many social-worker members, it identifies with the dilemma of one whose ethical duties require the maintenance of a client's confidence, regardless of whether the current law provides legal support for that position. The CCDH is firmly committed to the proposition that the law must meet, not violate, moral and ethical standards.

COMITE UNITARIO CONTRA LA REPRESION (UNITARY COMMITTEE AGAINST REPRESSION) is concerned with human rights in general and specifically with the human rights of those who are persecuted and imprisoned for political reasons. As part of its work, the Committee has denounced the use of the grand jury, the federal courts and other agencies for repressive ends in Puerto Rico.

CONCILIO GENERAL DE TRABAJADORES (GENERAL COUNCIL OF WORKERS) is a labor organization which affiliates eight labor unions in Puerto Rico, which in turn represent 25,000 workers. The eight unions are: the Teachers' Federation, the National Health Workers' Union, the Independent Union of Legal Services Workers, the Communications Authority Workers Indpendent Union, the Brotherhood of Exempt, Non-Teaching Employees of the University of Puerto Rico, the Brotherhood of Labor Department Employees, the General Workers' Union and the Puerto Rican Association of University Professors.

INSTITUTO PUERTORRIQUENO DE DERECHOS CIVILES (PUERTO RICAN INSTITUTE FOR CIVIL RIGHTS) (IPDC) is an organization dedicated to the defense and expansion of civil rights and liberties in Puerto Rico. In pursuit of these goals, the IPDC undertakes litigation in the areas of civil rights and liberties, as well as carrying out public education and training projects, as integral parts of its work. The IPDC has provided counsel to independence advocates who have been the objects of federal grand jury abuses and government repression.

INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (IADL) is a membership organization, founded in 1946 with and over 90 affiliate associations in every continent. The IADL is a Non-Governmental Organization in consultative status with the United Nations Economic Social and Cultural Council and with UNESCO. It has worked closely with other international human rights organizations in monitoring attacks on the independence of the judiciary and on the right of lawyers to represent their clients to

the fullest extent guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other applicable regional conventions.

THE NATIONAL CONFERENCE OF BLACK LAWYERS is a non-profit organization of more than 700 lawyers throughout the United States, Canada and the Virgin Islands and 2500 law students through the Black American Law Students Association. Among its primary goals is the insurance of the fair and equitable administration of justice. The NBCL is engaged in both affirmative litigation to correct racial injustices and the criminal defense of individuals who are prosecuted either because of their race or their political beliefs. With such goals, we are deeply distressed by any threat to the right to counsel and to the confidential attorney-client relationship.

THE NATIONAL LAWYERS GUILD is a national organization representing 8000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly committed and is working actively to protect and preserve the fundamental privilege between attorneys and their clients. Furthermore, the Guild's Grand Jury Project has worked for many years to prevent grand jury abuses. The Grand Jury Project has engaged in public and professional education and assisted in litigation on behalf of victims of the political abuses of the grand jury. From about 1975 to 1980 Linda Backiel worked as a staff attorney for the Guild's Grand Jury Project. In that capacity and afterwards Ms. Backiel testified before various Congressional committees considering grand jury reform legislation.

UNION INDEPENDIENTE DE ABOGADOS DE ASISTENCIA LEGAL (INDEPENDENT UNION OF LEGAL AID SOCIETY ATTORNEYS) (UIAAL) is a labor organization which represents all attorneys that work for the Legal Aid Society in

Puerto Rico. The Society is a non-profit organization that provides legal representation in the courts of the Commonwealth of Puerto Rico to indigent persons charged with criminal offenses. The Society is involved in more that 70% of all criminal cases in Puerto Rico. The Independent Union of Legal Aid Society Attorneys is concerned about any invasion of the confidential communication between a client and his/her attorney and the infringement of the constitutional right to counsel protected by the Puerto Rican and United States Constitutions.

UNION INDEPENDIENTE DE SERVICIOS LEGALES (UISL) INDEPENDENT UNION OF LEGAL SERVICES is a labor union that represents 400 workers of the Legal Services Corporation in Puerto Rico. UISL includes lawyers, paralegals, legal assistants, clerical and janitorial workers. UISL brings services of quality to the indigenous people of Puerto Rico. UISL is against the use of the Federal Grand Jury to oppress groups and individuals supporting social change.

THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. is a New York not-for-profit corporation established to protect the legal rights of Puerto Ricans and other Latinos through legal advocacy, including litigation in such areas as education, employment, housing, migratory labor, and the administration of criminal justice. P.R.L.D.E.F. is concerned with any invasion into the confidential communications between a client and his/her attorney and infringment of the Sixth Amendment right to counsel. P.R.L.D.E.F. is especially distressed by the subpoena served upon Ms. Backiel because it threatens the ability of controverial clients and causes to obtain effective legal representation.

UNION INDEPENDIENTE DE TRABAJADORES DE AEROPUERTO (INDEPENDENT UNION OF AIRPORT WORKERS) is a labor organization which represents four sectors of the airport workers at Luis Munoz Marin International Airport. It opposes the use of the Grand Jury against labor unions, political

organizations and private citizens.

UNION INDEPEDIENTE DE TRABAJORES DE SERVICIOS LEGALES (UITSL) (INDEPENDENT UNION OF LEGAL SERVICES WORKERS) is a labor union that represesnts 400 workers of the Legal Services Corporation in Puerto Rico. UITSL includes lawyers, paralegals, legal assistants, clerical and janitorial workers. UITSL brings services of quality to indigent people in Puerto Rico. It is against the use of the Federal Grand Jury, and especially in those cases where it is used as a repressive instrument against groups, individuals and lawyers who represent and support social change.

## SUMMARY OF ARGUMENT

Compelling a defense attorney to testify about her client before a grand jury undermines the very foundation of our adversial system of justice. It turns the defense attorney into a witness for the prosecution. It seriously, perhaps fatally, impairs the trust that forms the basis of an effective attorney-client relationship. It makes the client fear to disclose all pertinent facts to her lawyer, and makes the lawyer hesitant to investigate her client's case thoroughly. In short, this practice threatens the Sixth Amendment guarantee of effective assistance of counsel.

The practice of compelling the testimony of defense attorneys threatens not only the foundation of the American system of criminal justice and the Sixth Amendment rights of defendants, but also the First Amendment rights of all involved. The practice lends itself to abuse. A hostile government can use the grand jury to harass both client and counsel, chilling the exercise of their freedom to associate with politically controversial individuals and organizations. Therefore, before the prosecution can compel a defense attorney to testify against her politically controversial client, and so burden the First Amendment rights of both, its motives must be subjected to the strictest judicial scrutiny. The government must show that the burden on First Amendment rights is necessary and as narrowly tailored as possible to serve a compelling government interest.

Since the district court has not required the government to make any showing at all, the writ of certiorari should be granted.

## ARGUMENT

### I. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY INTRUDES UPON THE CONFIDENTIAL ATTORNEY-CLIENT RELATIONSHIP

This case brings before the Court an issue that affects the very foundation of our system of criminal justice. The attorney-client relationship is the backbone of the adversarial legal system. In order for this relationship to function effectively, the mutual trust and confidence between attorneys and their clients must be respected. Subpoenas, like the one served upon Ms. Backiel, that seek the testimony of an attorney about her client attack this essential element of loyalty and confidentiality. Thus, such subpoenas threaten not only the relationship between an individual attorney and her client, but also the effective administration of justice. If the government fails to respect the attorney-client relationship, it is imperative that the judiciary intercede to protect the adversarial nature of our system of justice.

The central importance of the attorney-client relationship is evidenced (but not fully circumscribed) by the many distinct protections the law affords it -- such as the attorney-client privilege, the attorney work-product doctrine, ethical rules protecting client confidences, and the Sixth Amendment right to effective assistance of counsel. The law has traditionally treated confidential communications with attorneys as an extraordinary form of evidence and accorded them special protections.[1] This Court has

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1 Prior to 1980, federal prosecutors generally did not consider lawyers as potential sources of information in criminal investigations and rarely subpoenaed them to testify before grand juries. Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1787

stressed the vital role of confidentiality and privacy to the attorney-client relationship in numerous cases. *See, e.g.*, *Upjohn* v. *United States*, 449 U.S. 383, 389 (1981); *Trammel* v. *United States*, 445 U.S. 40, 51 (1980); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976); *United States* v. *Nobles*, 422 U.S. 225, 237 (1975); *Hickman* v. *Taylor*, 329 U.S. 495, 510-11 (1947). It has reaffirmed in recent decisions the historical role played by the attorney-client privilege:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

*Upjohn* v. *United States*, 449 U.S. at 389 (citations omitted).

Amici recognize that the attorney-client privilege protects only "those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). But our concern is broader than the limited contours of the evidentiary rule. Subpoenas targeted at attorneys jeopardize the *attorney-client relationship* itself, which the privilege was designed to protect. The attorney-client privilege is premised on the belief that the administration of justice requires the full and frank disclosure between attorney and client of all relevant facts. *McCormick on Evidence*, *supra* sec. 87 at 205. The

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(1988). It is only in the last decade that the government's use of the "attorney subpoena" has become an alarming threat to the long-standing tradition of confidentiality in the attorney-client relationship.

time-honored place of the attorney-client privilege recognizes the importance of the confidential relationship between a lawyer and her client. The proper functioning of the judicial system depends upon the client's confidence in the attorney as a faithful advocate. The attorney-client privilege represents the acknowledgment that confidentiality is more important than a rule of total disclosure. The privilege is based on the conviction that justice is better served by requiring that confidences be maintained than that information always be disclosed.

Subpoenas, like the one at issue in this case violate these principles in two critical ways. First, they shatter the protection against disclosure that ensures unfettered communication between an attorney and her client. This Court has recognized the consequences of the loss of confidentiality: "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). *See also ABA Standards for Criminal Justice*, Standard 4-3.1(a) & commentary (2d ed. 1980) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer").

Second, the subpoena at issue compels Ms. Backiel to assume a role that is antithetical to her ethical obligations as a lawyer: it forces her to become an informer against her client. The cardinal rule of the attorney-client relationship is that the attorney must guard the confidences of her client. Her role as an advocate is single-mindedly to represent the interests of her client. Canon 4 of the American Bar Association *Model Code of Professional Responsibility* directs the attorney to "preserve the confidences and

secrets of a client." EC 4-6 (1982).[2] Ethical Consideration 4-4 further requires the attorney "to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." The prosecution in this case knew full well that, since her client's whereabouts were unknown, there was no way for Ms. Backiel to advise and consult her client, as Ethical Consideration 4-4 requires. Thus, the government knowingly forced Ms. Backiel to decide between violating her ethical obligations and going to jail. Putting an attorney to such a choice clearly interferes with her ability to be an effective advocate.

The purpose of the ethical requirement of confidentiality -- the duty to "preserve the confidences and secrets of a client" -- is to ensure a bond of trust between the lawyer and her client. In order to preserve that trust, there must be a broad cloak of protection surrounding the communications between attorney and client beyond simply shielding each piece of privileged information. The requirement to preserve a client's "secrets" is expansive in scope: it refers to "information gained in the professional relationship that the client has requested be held inviolate or that disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Model Code of Professional Responsibility* DR 4-101(A) (1982). The confidentiality rule thus applies to more than just incriminating evidence. It protects all information that the client communicates to his lawyer in confidence, as well as any other

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2 The *Model Code of Professional Responsibility* provides:

> [A] lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

*Model Code of Professional Responsibility* DR 4-101(B)(1982) (footnotes omitted).

information relating to the representation. *Model Rules of Professional Conduct* Rule 1.6 Comment (1983). The grand jury subpoena issued to Ms. Backiel demands that she engage in conduct that directly contradicts these fundamental ethical requirements. The power to subpoena an attorney thus deprives the attorney-client relationship of its essential element of mutual trust and confidence.

## II. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY BURDENS THE SIXTH AMENDMENT RIGHT TO COUNSEL

The government's intrusion into the confidential relationship between a lawyer and her client ultimately burdens the Sixth Amendment right to counsel. This Court has repeatedly recognized the fundamental nature of that right. *See, e.g.*, *Escobedo* v. *Illinois*, 378 U.S. 478, 490-91 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335, 342-43 (1963); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). This Court explained the importance of the right to counsel in *Powell* v. *Alabama*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 69. Thus, this Court stated in *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938), the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.... stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

If the government is allowed to turn an attorney into an informant against her own client, a clear message is sent to all clients that their attorneys cannot be trusted. A client's knowledge that any confidences he trusts to his attorney may be divulged at the behest of a prosecutor will inhibit him from freely sharing

information with his lawyer. This chilling of communications between attorney and client prevents attorneys from effectively representing their clients.

The American Bar Association has emphasized the crucial role played by unfettered attorney-client communication in ensuring effective legal representation:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client *not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance*....A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.

*Model Rules of Professional Conduct* Rule 1.6 comment (1983)(emphasis added).

Courts have also noted this connection between the chilling of communication between a client and his attorney and the denial of effective assistance of counsel:

> If a client feels that part or all of his conversations with his attorney may one day be divulged, that client will necessarily refrain from being fully open and truthful with this attorney. This, in turn, will result in less than effective assistance of counsel and could very well result in diminishing the importance of the Sixth Amendment's right to assistance of counsel.

*In re Witness-Attorney Before Grand Jury No. 83-1*, 613 F. Supp. 394, 399-400 (S.D. Fla. 1984). *Accord Fisher* v. *United States*, 425 U.S. 391, 403 (1976); *Weatherford* v. *Bursey*, 429 U.S. 545, 563-65

(1977)(Marshall, J., dissenting); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

*Amici* are deeply concerned that the policy of subpoenaing attorneys to give evidence about their clients has already had a demoralizing effect on the legal profession. As two commentators involved in litigation concerning attorney subpoenas have noted: "It is not an overstatement to say that the government's new attorney subpoena policy has caused widespread fear and anxiety in the criminal defense bar." Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 U. P. L. R. 1783, 1795 (1988). This assault on the practice of law can only result in the wholesale deprivation of the Sixth Amendment right to effective assistance of counsel.

Forcing any criminal defense attorney to testify about her client will have far-reaching ramifications for our adversary system of justice. The effects go far beyond the harm to a single client. Turning lawyers into informants will weaken the effectiveness of the provision of legal counsel in general. In this case, the greatest danger posed by the subpoena issued to Ms. Backiel is not the damage to her relationship with her individual client, but the threat it poses for *society's* interests that are served by the adversary system as a whole. *Amici* fear that the district court's total disregard of these issues will result in the erosion of the Sixth Amendment's guarantees. Amici find it especially disturbing that the Third Circuit's opinion virtually ignored this important constitutional issue at the heart of this case.

## III. THE GOVERNMENT MUST MAKE A PRELIMINARY SHOWING OF NEED BEFORE AN ATTORNEY CAN BE COMPELLED TO TESTIFY

The confidential relationship between attorney and client is the cornerstone of our adversary system. Any intrusion into this special relationship must therefore be examined with utmost scrutiny. Indeed, the issue of whether special constraints should apply to attorney subpoenas has been the subject of considerable controversy. In the past several years there have been conflicting circuit court decisions[3] concerning the extent of a prosecutor's power to compel the testimony of an attorney whose client is the target of the grand jury's investigation. Many courts have expressed their concern over this "disturbing" practice.[4] In addition, numerous legal scholars who have studied this question have called for limits on this potentially devastating attack on the attorney-client relationship.[5] As one commentator has observed:

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3 *See, e.g., In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir.), *vacated*, 781 F.2d 238 (2d Cir. 1985)(*en banc*), *cert. denied*, 475 U.S. 1108 (1986); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1982), *vacated & withdrawn*, 697 F.2d 112 (4th Cir. 1982)(*en banc*); *In re Walsh*, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980).

4 *See, e.g., United States* v. *Wolfson*, 558 F.2d 59, 65 (2d Cir. 1977)("We are sensitive to the grave dangers posed when counsel appears before the same grand jury that indicted defendant"); *United States* v. *Colacurcio*, 499 F.2d 1401, 1404 (9th Cir. 1974); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 843 (8th Cir. 1973); *In re Grand Jury Subpoena to Attorney (under Seal)*, 679 F. Supp. 1403, 1404 (N.D.W. Va. 1988)("The implications of this disturbing practice are great, to the point of threatening the keystone of the attorney-client relationship, most notably the trust placed by clients in their attorneys");*In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958, 969 (D. Mass. 1985); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945 (E.D. Pa. 1976)("We observe preliminarily that we are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client"); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

5 *See, e.g.*, Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 **Hastings L.J.** 821 (1985); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 **U. Pa. L. Rev.** 1783 (1988); Suni, *Subpoenas to Criminal Defense Lawyers: A Proposal for Limits*, 65 **Or. L. Rev.** 215 (1986); Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 **Am. Crim. L. Rev.** 95 (1985); Zwerling, *Federal Grand Juries*

> The new effort by prosecutors ... to erode individual privacy by compelling lawyers to produce evidence incriminating their clients is at once both alarming and all-too-predictable.... [T]he prosecutors' actions threaten the core and fibre of the attorney-client relationship.... [I]t is incomprehensible that the courts have not uniformly recognized the serious threat to criminal defendants, their attorneys and to the entire criminal justice system posed by the effort to transform the defense lawyer into a witness for the prosecution.

Tarlow, *Witness for the Prosecution -- A New Role for the Defense Lawyer*, 1 J. Crim. Def. 331 (1975).

The government's interest in a lawyer's testimony cannot by itself justify this infringement on the attorney-client relationship and the Sixth Amendment rights of defendants. Courts must engage in an analysis of whether or not the government's interest does indeed outweigh the fundamental right of all criminal defendants to competent legal representation and society's interest in the effective administration of justice. It is simply too dangerous to our adversary system to allow prosecutors unbridled use of the subpoena to compel evidence from attorneys about their clients. Because of the very serious effect of compelling an attorney's testimony, the government should be held to a standard of need for the testimony

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*v. Attorney Independence and the Attorney-Client Privilege*, 27 **Hastings L.J.** 1263 (1976); Note, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 **Ga. L. Rev.** 747 (1986); Note, *The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients*, 13 **Pepperdine L. Rev.** 791 (1986). *See also Reform of the Grand Jury System: Hearings on S. 3274 Before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 84-86 (1976)(testimony of Melvin B. Lewis, Legislative Chairperson of The National Association of Criminal Defense Lawyers).

that is higher than that applied in the case of an ordinary witness. Only if the information is both relevant and absolutely necessary to the government's investigation should society's interest in the attorney-client relationship give way. The government should bear the burden of demonstrating that there is no less intrusive means of acquiring the information it seeks. Certainly the importance of preserving the attorney-client relationship justifies the minimal burden that this requirement would place on grand jury investigations.

Several courts, recognizing the damaging effect of compelling testimony from an attorney, have applied this higher standard. In *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1982), *vacated on other grounds & withdrawn*, 697 F.2d 112 (4th Cir. 1982)(*en banc*), the Fourth Circuit adopted the rule that the government must make a preliminary showing of relevance and need when a subpoenaed attorney is in an ongoing attorney-client relationship with the target under investigation.

Both courts and commentators have advocated the adoption of a preliminary showing requirement in order to diminish the threat that attorney subpoenas pose for the attorney-client relationship. *See, e.g., In re Grand Jury Subpoena Served upon Doe*, 759 F.2d 968, 975 (2d Cir.)(adopting *Harvey* preliminary showing requirement), *vacated*, 781 F.2d 238 (2d Cir. 1985)(*en banc*), *cert. denied*, 475 U.S. 1108 (1986); Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 **Hastings L.J.** 821, 867-871 (1985)(proposing preliminary showing requirement before issuance of any subpoena to an attorney for a target of a grand jury investigation); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 **U. Pa. L. Rev.** 1783, 1831-35 (1988)(same); Suni, *Subpoenas to Criminal Defense*

*Lawyers: A Proposal for Limits*, 65 Or. L. Rev. 215, 277-91 (1986)(same).

District courts have also applied the requirement of a preliminary showing to subpoenas issued to a target's attorney. *See, e.g., In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958 (D. Mass. 1985)(holding that government has burden of showing subpoenaed information was necessary and unobtainable by other reasonable means); *In re Witness-Attorney Before Grand Jury No. 83-1*, 613 F. Supp. 394 (S.D. Fla. 1984). The court in *In re Witness-Attorney Before Grand Jury No. 83-1, supra*, further explained the showing of need that the government must make in order to justify compelling an attorney's testimony:

> A criminal defense attorney should not be brought before a federal grand jury and be compelled to divulge attorney-client secrets where the government could very well utilize alternative, less intrusive, methods in order to gain the very same information.

613 F. Supp. at 398.

State courts have similarly limited the use of attorney subpoenas. In *In re Nackson*, 221 N.J. Super. 187 (App. Div. 1987), *aff'd*, 114 N.J. 527 (1989), for example, the New Jersey Appellate Division reversed an order directing an attorney, Nackson, to answer questions before a grand jury concerning the whereabouts of his client, a fugitive. Nackson had spoken twice with his client on the telephone about the client's possible return to New Jersey for disposition of the criminal charges. Nackson refused to reveal to a grand jury his client's telephone number, occupation and employer. The trial judge concluded that this information was not privileged and directed Nackson to testify. The Appellate Division reversed the trial judge's order, holding that, if there were "less intrusive

means for obtaining information to return an indictment against the client of an attorney, those means must be pursued to avoid any infringement on the cherished Sixth Amendment and state constitutional right to counsel." 221 N.J. Super. at 206-07. Under the test applied in *Harvey*, *In re Grand Jury Subpoena (Legal Services Center)*, *In re Witness-Attorney before Grand Jury No. 83-1*, and *In re Nackson*, the subpoena issued in this case to Ms. Backiel would clearly be quashed.

As discussed above, the practice of compelling attorneys to divulge information about their clients threatens not only the particular relationship between the subpoenaed attorney and her client but the attorney-client relationship *in general*, as well as the Sixth Amendment right of counsel of all criminal defendants.

The District Court and the Third Circuit in this case treated the subpoena issued to Ms. Backiel as if it were a run-of-the mill demand for grand jury testimony. The government should not be able to obtain information from an attorney about her client as easily as it may obtain evidence from any other witness. As Judge Frankel recognized twenty years ago, "it bears emphasis that while the witness before us is a lawyer, the crucial interests at stake belong to the whole community.... [T]his has nothing to do with whether lawyers for their own sakes should be treated better or worse than other people. It has to do with how the public may fare...." *In re Terkeltoub*, 256 F. Supp. 683, 684-85 (S.D.N.Y. 1966).

## IV. THE INSTANT SUBPOENA VIOLATES LINDA BACKIEL'S FIRST AMENDMENT RIGHTS

Linda Backiel has devoted much of her professional career to representing those whom the First Amendment's guarantees of free speech, association, petition and assembly were specifically designed to protect -- radical critics of government. As a legal worker, law

student, and lawyer, she has participated in dozens of cases seeking to vindicate the rights of such persons to associate, assemble, petition and advocate, and to be free from harassment for expressing their views.

For the last four years she has dedicated her legal skills and energies to the defense of the Puerto Rican independence movement. In particular, for the last four years she has represented Antonio Camacho Negro and co-defendants in a federal criminal prosecution of fifteen Puerto Rican independence advocates, *United States v. Gerena et al.*, Indictment No. H85-50 (TEC) (D.Conn.), charged with conspiracy and related offenses in connection with a 1983 Wells Fargo robbery of $7 million in West Hartford, Connecticut, in which the government alleged that defendants were members of Los Macheteros, an organization of Puerto Ricans struggling for the independence of their country. *See United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987), *reh'g denied*, 837 F.2d 61 (2d Cir. 1988). While initially the press in the United States attempted to portray the Hartford trial as an ordinary criminal trial, even local newspapers were constrained to the editorials titled "Who Are the Real Lawbreakers?", criticized the F.B.I. Many both on the island and in the United States, see the prosecution as merely the latest incident in a ninety-two year history of persecution of the independence movement.[6]

Moreover, Ms. Backiel has no information responsive to the subpoena or relevant to the grand jury's decision whether to indict Ms. Duke. It is submitted that the U.S. Attorney knows full well that (a) he does not need Backiel's testimony to obtain an indictment,

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6 *See, e.g., Testimony* of International League for the Rights and Liberation of Peoples, the Center for Constitutional Rights, the Puerto Rican Institute for Civil Rights, the Unitary Committee Against Repression, the National Lawyers Guild, and others, presented August 14, 1990, before the United Nations Special Committee on the Implementation of the Resolution of the Granting of Independence to Colonized Nations and Peoples.

*see, e.g., United States v. Wells*, 766 F.2d 12, 22 (1st Cir. 1985), and that (b) she will not provide any testimony about any client behind the closed doors of a grand jury room. It is further submitted that, rather than some rightful demand for information necessary, or even useful, to the legitimate purposes of the grand jury, -- the instant subpoena was issued and is intended to serve two illicit purposes: to freeze testimony and/or obtain evidence for trial and, of greater concern to *amici*, to harass and punish the witness for her advocacy on behalf of politically controversial clients.

Indeed, *amici* perceive the instant subpoena as a direct response to Ms. Backiel's advocacy for those involved in the Puerto Rican independence movement. It would appear that the service of the Philadelphia subpoena by two of the FBI agents in charge of the last two cases in which she represented alleged members of an independence organization (one of whom was acquitted of assault on the FBI) was, if not direct retaliation for her advocacy, at least intended to serve as a warning that such advocacy could have its price. Moreover, given her longstanding public and well-known position about political abuses of the powers of the grand jury,[7] it would appear that those who decided to issue and serve the subpoena did so to force her to choose between jail and potential loss of her profession and betraying her clients.

American courts have a long tradition of recognizing the sanctity of the attorney-client relationship and its grounding in the Sixth Amendment (*see supra* points I and II). *Amici* contend that, in

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7 *See, e.g., Hearings Before the Subcommittee on Immigration, citizenship and International Law of the Committee on the Judiciary House of Representatives*, Ninety-Fifth Congress, First Session, on HR 94 "Grand Jury Reform," March 17, April 27, June 1 and 29, 1977, Part I, Serial No. 22, Testimony of Linda Backiel, Grand Jury Project, and *Hearings Before Subcommittee on Criminal Justice of the Committee on the Judiciary House of Representatives*, on HR 1407, "The Grand Jury Reform Act of 1985," May 8, 1985, Testimony of Linda Backiel.

the case of lawyers who represent, and thus enjoy the confidence of, clients who are political dissidents, an even more sacred truth must attach. The very sanctity of the right to free political association guaranteed by the First Amendment especially informs such relationships, and is also threatened here.

It is axiomatic that the right to express and advocate dissent is protected by the First Amendment. *Amici*, which are organizations whose members represent individuals and groups which regularly engage in such protected activity, are concerned that compelling an attorney who serves as a professional advocator to testify before a grand jury will chill their own First Amendment activities as well as those of their members and clients. *Cf. NAACP v. Button*, 371 U.S. 415, 430-31 (1963). It is well documented that grand juries have often been used by the government for the improper purpose of suppressing political dissent.[8] If the courts will not protect politically vulnerable relationships from cavalier governmental intrusion, the continued existence of such relationships is seriously threatened.

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8 *See, e.g.*, Berkan, *The Federal Grand Jury: An Introduction to the Institution, Its Historical Role, Its Current Use and the Problems Faced by the Target Witness*, 17 **Inter-American U.L. Rev.** 102 (1983); Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 **J. Crim. L. & Criminology** 1159 (1984). As one commentator has observed:

> Federal grand juries have less than a clean slate with respect to the First Amendment. The era of alien and sedition laws was characterized by intemperate judicial charges to grand juries which were inconsistent with a concern for First Amendment rights. It was not however until the late 1940's that grand juries began the vigorous inquiry into allegedly dissident political associations, including the independent secretariat of the United Nations, subpoenaing the very targets of investigations, and parallelling, sometimes even duplicating, congressional committee investigations. Recently, there has been a resurgence of such grand jury investigations into at least marginally-protected activities, resulting in the assertion by scholars, newsmen and others of first amendment rights.

Boudin, *The Federal Grand Jury*, 61 **Geo. L.J.** 1, 4 (1972)(citations omitted).

This Court has often held that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972), citing, at 680, n. 18, *NAACP v. Button*, *supra*; *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may pervail only upon showing a subordinating interest which is compelling."); *Schneider v. State*, 308 U.S. 147, 161 (1939); and *NAACP v. Alabama*, 357 U.S. 449, 464 (1958). *See also Buckley v. Valeo*, 424 U.S. 1, 64 (1976)("[S]ignificant encroachments on First Amendment rights...cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny."); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963); and *Reporters Com. v. American Telephone & Telegraph*, 593 F.2d 1030, 1064 (D.C. Cir. 1978), *cert. denied* 440 U.S. 949 (1979)

This Court more recently has found the danger greater to First Amendment rights where the governmental infringement affected supporters of an unpopular cause - in that case, a minor political party - who found "services rendered scarce because of public hostility and suspicion." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-97 (1982) (footnote omitted).

The government, by seeking to compel Ms. Backiel to testify threatens Backiel's relationships to all her past, present and future clients, most of whom indeed have been political dissidents and advocates of unpopular political causes. Yet the government has made no showing of a "compelling" need to burden Backiel's First Amendment right to freedom to association, nor have the courts below required such a showing. *See Branzburg v. Hayes*, *supra*. There

has been no "exacting scrutiny" of the State's subordinating interests in abridging such right. *See Buckley v. Valeo*, *supra*.

> [W]hen governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicating its subordinating interests.

*Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972). *See also In re Stolar*, 401 U.S. 23 (1971). The government in the instant case has so far not been required, either by the district or the circuit court, to meet its burden of establishing a compelling need for Backiel's testimony -- or, indeed, any need for it at all -- sufficient to overcome her substantial First Amendment rights. This Court must oblige it to do so.

*Amici* submit that if the courts do not insulate Backiel's First Amendment right to freedom of association, theirs are equally as ephemeral. We therefore urge that this Court grant the petition for a writ of *certiorari*.

## CONCLUSION

*Amici* are alarmed by the government's ever-increasing use of the grand jury to seek incriminating evidence against a citizen by compelling it from her lawyer. As we have demonstrated above, this practice threatens the very foundation of our adversarial system of justice. The government has increasingly subjected lawyers with whom it disagrees to sanctions and contempt in order to limit their effectiveness as advocates for unpopular causes.

*Amici* believe that this Court should place a reasonable restraint on this practice that threatens to eviscerate the attorney-

client relationship and the Sixth Amendment right to counsel. *Amici* urge this Court to require that, before the issuance of a grand jury subpoena to an attorney seeking information about her client, the government must make a preliminary showing that the information sought from the attorney is material and necessary to the investigation and that there is no less intrusive means to acquire the information. The writ of certiorari should therefore be granted.

RESPECTFULLY SUBMITTED,

ARTHUR KINOY
DOROTHY E. ROBERTS
*Rutgers School of Law—Newark*
15 Washington Street
Newark, New Jersey 07102
(201) 648-5561
MARTHA COPLEMAN
60 Pineapple Street
Brooklyn, NY 11201
(718) 858-4620
*Attorneys for Amici Curiae*

*Counsel of Record

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